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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 158

THE BOSTON METALS COMPANY,

AND

PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL INSURANCE COMPANY,

Petitioners,

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER FOURTH COMPENSATION DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RICHARD C. WHITEFORD,
301 N. Charles Street,
Baltimore, Md. 21201,
Attorney for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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Opinions Below

The Opinion of the District Court in this case has not yet been reported. The Opinion of the Court of Appeals is reported at 329 F. 2d 504. The Opinion of the Court of Appeals is found in Appendix A, *infra*, 1a-4a. The Opinion of the District Court is found at Appendix B, *infra*, 5a-7a.

Jurisdiction

The Judgment of the Court of Appeals was entered on March 9, 1964. Jurisdiction of this Court rests upon 28 U.S.C.A. 1254(1).

Questions Presented

Whether compensation for injuries sustained by an employee will be within the coverage under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.A. 901, et seq., or the Workmen's Compensation Law of Maryland (Article 101, Annotated Code of Md.) since the vessel upon which the employee was working had been deliberately run aground in the navigable waters of the Baltimore Harbor, was not to be refloated, and was in the process of being broken down for scrap.

Statute Involved

The Longshoremen's and Harbor Worker's Compensation Act as amended 33 U.S.C.A. 901, et seq., provides in pertinent part:

Sec. 902. Definitions.

When used in this chapter—

* * * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment. * * *

* * * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any drydock).

* * * * * *

Sec. 903. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disabiilty or death results from an injury occurring upon the navigable waters of the United States (including any drydock). * * *

* * * * * *

Sec. 905. Exclusiveness of liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representatives, husband or wife, * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, * * *

* * * * * *

Sec. 919. Procedure in respect of claims.

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner * * * and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * * *

Sec. 920. Presumptions.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * * *

Sec. 921. Review of compensation orders.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, * * *

The Workmen's Compensation Law of Maryland, Art. 101 Annotated Code of Md. reads in part as follows:

Sec. 21. To what employment article applicable; extra-hazardous employments.

Compensation provided for in this article shall be payable for injuries sustained or death incurred by

employees engaged in the following extra-hazardous employments:

* * * * * *

(8) The operation, within or without the State, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company.

(9) Shipbuilding, including construction and repair in a shipyard or elsewhere, not included in paragraph (8).

* * * * * *

(50) In addition to the employments set out in the preceding paragraphs, this article is intended to apply to all extra-hazardous employments not specifically enumerated herein, and to all the work of an extra-hazardous nature.

Sec. 64. Presumptions.

In any proceeding for the enforcement of a claim for compensation under this article, it shall be presumed, in the absence of substantial evidence to the contrary.

(a) That the claim comes within the provisions of this article.

Statement

This case involves the application of the Longshoremen's and Harbor Worker's Compensation Act (Longshoremen's Act) to injuries sustained by an employee while dismantling a vessel that had been deliberately run aground in the Baltimore Harbor.

The facts in the case which were agreed upon at the hearing before the deputy commissioner are not in dispute, and are as follows:

On July 21, 1961, Richard Harris was injured while engaged in dismantling a gun turret on the U.S.S. Guam. He died several days after the injury as a result of his injuries. He is survived by a wife and several minor

children. At the time of his injury, Mr. Harris was employed by the Boston Metals Company and his duties consisted of using an acetylene torch to cut and burn metal as required by his employer in the dismantling of the U.S.S. Guam.

Among other various functions performed by the employees of Boston Metals Company, a portion of the work force is utilized to load scrap metal onto ships. The U.S.S. Guam was purchased by the Boston Metals Company from the United States Navy in accordance with a contract, the terms of which required that certain portions of the vessel, such as the guns, be returned to the Navy and that the remainder of the vessel be completely broken down for scrap. The contract provided that the vessel must be totally broken down and that it could not be used for any purpose other than scrap metal. The ship could not be remodeled or remade into another type of vessel.

The U.S.S. Guam was a decommissioned battle cruiser of the United States Navy. Its engines were disconnected and inoperable. The propellers were secured. The vessel had been deliberately run aground along the north side of the main pier of Boston Metals Company located at Curtis Bay on the Patapsco River. The vessel was not afloat at the time of Mr. Harris' injury. The U.S.S. Guam was not to be refloated but was to be removed piecemeal as the dismantling operations progressed.

Upon the aforegoing facts, the deputy commissioner passed an award of compensation to the widow and children of Mrs. Harris. Mrs. Harris who had filed a claim under the Workmen's Compensation Law of Maryland did not pursue her remedy any further under the Maryland Act. No compensation had been paid to her under the Maryland Act. On appeal, taken pursuant to 33 U.S.C.A. 921, the

U.S. District Court for the District of Maryland affirmed the decision of the Deputy Commissioner and dismissed the complaint of the Boston Metals Company. On a further appeal to the Fourth Circuit Court of Appeals, the Court of Appeals affirmed the decision of the District Court. The Petitioners have maintained that compensation to the survivors of Mr. Harris should be paid only under the laws of Maryland. The Court of Appeals held that the case of *Calbeck v. Travelers Insurance Company*, 370 U.S. 114 (1961), was determinative of this case. The Court of Appeals quoted from the *Calbeck* decision at page 116 as follows:

> * * * Our conclusion is that Congress invoked its constitutional powers so as to provide compensation for all injuries sustained by employees on navigable water whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law.

At page 507 in its opinion, the Court of Appeals held that

> * * * since Harris received his injuries on navigable waters we agree with the District Judge that *Calbeck* is controlling in this case.

Reasons For Granting Writ

The Court of Appeals in this case has announced the rule that an employee injured while working on a vessel that has been deliberately run aground so that the vessel was no longer afloat and never again would float, is covered under the Longshoremen's and Harbor Worker's Compensation Act. This ruling had decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

The ruling of the Court of Appeals clearly is in conflict with the wording of the Act which provides that the injury must occur "upon the navigable waters of the United States * * *"

Argument

In 1917, the Supreme Court of the United States in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, held that a State could not validly award workmen's compensation upon the claim of a stevedore who was injured while aboard and unloading a ship. The Court, in deciding that the New York State Workmen's Compensation Law was not and could not be applicable, stated at page 216:

> * * * And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudiced to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relation * * *.

As a result of the ruling in *Jensen*, Congress made several attempts legislatively to allow state compensation laws to apply to stevedores. The Courts struck down these attempts and finally, in 1927, Congress passed the Longshoremen's and Harbor Worker's Compensation Act. This Act was expressly to provide workemen's compensation benefits to those employees who could not be validly covered under the state compensation acts because of the Constitutional impediments which prohibited the States from exercising jurisdiction in the maritime field. The law is presently codified in 33 U.S.C.A. 901 and following sections. Sec. 903(a) provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United

> States (including any dry dock) and if recovery for disability or death through workmen's compensation proceedings may not validly be provided by State Law. * * *

In 1962, this Court in *Calbeck v. Travelers Insurance Co.*, supra, decided that the words, "and if recovery for disability or death through Workmen's Compensation proceedings may not validly be provided by State Law", were not intended to limit the scope of the act.

Relying upon the decision in the *Calbeck* case and the decision in *Davis v. Dept. of Labor*, 317 U.S. 247 (1942), the case which established the so-called "twilight zone", the deputy commissioner awarded and the District Court and Court of Appeals affirmed, the award of compensation to the survivors of Richard Harris. It is the position of the employer and insurer that the decision of the Court of Appeals is erroneous and that the sole and exclusive remedy for the survivors of the fatally injured workman would come under the Workmen's Compensation Act of Maryland.

It is submitted that the U.S.S. Guam was not afloat and "upon navigable waters" at the time of Mr. Harris' injury. The agreed facts taken from the finding of the deputy commissioner are that—

> on arrival in Baltimore 18 July 1961, the "Guam" was deliberately pushed with a running start by five (5) tugs into the mud along the north side of the employer's main pier; that the mean draft of the "Guam" was 26'9"; that the average depth of the Patapsco River at this point (including 2' of soft mud) is 23' that the "Guam" was thereafter secured to the pier with steel cables, where it was to remain for the entire scrapping operation.

The vessel was simply a pile of junk to be turned into other uses. Under the contract with the Government, the Boston Metals Company was required to totally break the ship down for scrap. The Guam was hard aground and not upon any waters. Under the wording of 28 U.S.C.A. 903(a), as a condition precedent to Federal jurisdiction, the vessel must have been "upon navigable waters."

A vessel which has been purposely rammed hard aground so that its position becomes fixed, is analogous to piers or other abutments, which, even though over navigable waters, have not been considered within the general admiralty jurisdiction. In *Cleveland Terminal and Valley R.R.C. v. Cleveland Steamship Co.*, 208 U.S. 316, 321, the Supreme Court stated:

> * * * the bridges, shore docks, protective pilings, piers, etc. pertain to the land. They are structures connected with the shore and they immediately concern commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such.

See also *State Industrial Commission of State of New York v. Nordenholt Corp.*, 259 U.S. 275:

> Insana was injured upon the dock, an extension of the land, (Citations omitted) and certainly prior to the Workmen's Compensation Act, the employer's liability for damages would have depended upon the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching upon the liability in question, it did not come into conflict with any superior maritime law. * * *.

It would appear that just because the injury occurred on a ship, per se this does not render an injury one which would fall within the admiralty jurisdiction, nor within

the jurisdiction of the Longshoremen's Act. In analogous situations, some lower federal courts have held that workers, though completely surrounded by navigable waters were not upon navigable waters.

In *Jeffers v. Foundation Co.*, C.C.A. 2d (1936), 85 F. 2d 24, the claimant, a diver, was employed to help build a foundation for a bridge to cross the Ohio River. Steel caissons were floated onto the river and then deliberately sunk by filling hollow portions of the caissons with concrete. The claimant, who, at the time of his injury was on a raft floating within the caisson after it had been sunk, was held not to be upon the navigable waters of the United States. The Court felt that the water within the caisson had been withdrawn from navigation, and so that although floating within the caisson, he was not upon navigable waters. Obviously, under this reasoning, if the claimant had actually been standing upon the caisson itself, he still would not have been upon the navigable waters of the United States.

> * * * a man injured while at work upon a pier or abutment, even though that projects into the navigable waters, is not within "general admiralty jurisdiction" (p. 25).

The Court continued at p. 25:

> The locus was therefore within the sole jurisdiction of the state whose laws alone determine liability.

In a similar case decided in 1940, *Massman Construction Co. v. Bassett*, D.C.E.D. Mo., 30 F. Supp. 813, where the claimant was working within a cofferdam in navigable waters, the Court held at page 815:

> The work of the deceased on the land in the cofferdam was not service performed "upon navigable waters" * * *

In each of the above cases, the place upon which the injured claimant was working was surrounded by navigable waters, but affixed to the bottom in a permanent position. This is the same basic position in which the U.S.S. Guam was found. By analogy, workers upon the U.S.S. Guam would certainly be in a similar position to the workers involved on the caisson and cofferdam in the *Jeffers* and *Bassett* cases.

Although Sec. 920 of the Longshoremen's Act declares that there is a presumption, "that the claim comes within the provision of this chapter", this presumption obviously is a presumption of coverage and that before this presumption can attach, there must be jurisdiction. It would appear that jurisdiction must first be established and then, and only then, would the presumption stated in the Act become effective. If there was no original jurisdiction, then in that instance no presumption in the statute could create or confer jurisdiction. *Crowell v. Benson*, 285 U.S. 22, 54:

> A different question is presented where the determinations of the facts are fundamental or "jurisdictional" in the sense that their existence is a condition precedent to the operation of a statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of the United States * * *. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (Sec. 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.
>
> In amending and revising the maritime law, the Congress cannot reach beyond the Constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is the navigability itself a question of fact, as waters

> that are navigable in fact are navigable in law, but where navigability is not in dispute, the locality of the injury, that is whether it has occurred on the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute * * *.

It is submitted that in order to apply the Longshoremen's Act to the facts of this case, that the Court of Appeals has reached "beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction".

It should be pointed out that the facts of this case are clearly distinguishable from both the *Calbeck* and *Davis* cases, supra. In *Calbeck*, the vessel on which the injury occurred was actually afloat upon the navigable waters of the United States. In the *Davis* case, the injury occurred on a barge licensed by the United States Bureau of Navigation floating on the Snohomish River.

The facts of the instant case are also distinguishable from those cases which held that vessels accidently wrecked or run aground, which are hazards to navigation, are still within the maritime jurisdiction, although aground. These cases, *Paine v. Jacksonville Forwarding Co.*, 290 F. 936 (5th Cir. 1923); *The Snug Harbor*, 46 F. 2d 143 (E.D.N.Y. 1931); *The Central States*, 9 F. Supp. 934 (E.D.N.Y. 1935), are not comparable to the instant case because of the accidental nature of the sinking in positions that were hazardous to navigation and commerce. The Guam was not accidently sunk or grounded. The Guam was not a hazard to navigation.

Conclusion

It is respectfully submitted that this matter does present an important question of federal law that should be decided and settled by the Supreme Court of the United States. It is respectfully requested that this Petition for a Writ of Certiorari be granted.

RICHARD C. WHITEFORD,
301 N. Charles Street,
Baltimore, Md. 21201,
Attorney for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 9163

BOSTON METALS COMPANY,
and
PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL INSURANCE COMPANY,
Appellants,

versus

STEPHEN O'HEARNE, Deputy Commissioner, Fourth Compensation District,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE, HARRISON L. WINTER, District Judge.

(Argued November 18, 1963. Decided March 9, 1964.)

Before HAYNSWORTH and BRYAN, Circuit Judges, and FIELD, District Judge.

FIELD, District Judge:

This is an appeal from an order of the District Court affirming a decision and order of the Deputy Commissioner awarding to the widow of Richard Henry Harris, deceased, compensation benefits pursuant to the provisions of the Longshoremen's and Harbor Worker's Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. Section 901, et seq. Here, as they did in the Court below, appellants challenge the jurisdiction of the Commission on the ground that the claim

for compensation was exclusively within the province of the Workmen's Compensation Act of Maryland.

Harris, employed as a welder by The Boston Metals Company, died as the result of injuries received while engaged in dismantling a gun turret on the U.S.S. Guam. The Guam, a decommissioned battle cruiser, had been sold by the Navy to The Boston Metals Company by a contract which provided that the vessel should be broken down for scrap. The contract further provided that certain equipment should be removed and returned to the Navy, and the ship could not be remodeled or remade into another type of vessel.

For the purpose of carrying out the scrapping operations, the Guam was towed by tugs from Bayonne, New Jersey, to Baltimore, and was deliberately run aground alongside the main pier of Boston Metals in the Patapsco River. At the time of sale and continuously thereafter, the engines of the Guam were disconnected and inoperable and the propellers had been secured. Harris received his fatal injuries shortly after dismantling operations had commenced.

Section 2(4)[1] of the Act provides that "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.") Section 3(a)[2] provides that "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The questions incident to the permissive scope and jurisdictional limits of the states and the federal government with respect to the compensation coverage of amphibious workers have plagued the courts since the landmark case

[1] 33 U.S.C.A. §902(4).
[2] 33 U.S.C.A. §903(a).

of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1916), which recognized the constitutional restrictions[3] upon the power of the states in this field. While the Longshoremen's Act was designed to ameliorate the situation of the employees by providing for federal compensation in those areas which the Court had held to be beyond the reach of the states, the provisory language of Section 3(a) left the jurisdictional controversy unresolved since Congress thereby accepted the *Jensen* line of demarcation between state and federal jurisdiction. *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941).

The continuing problem under the Act was recognized and stated in *Davis v. Department of Labor*, 317 U.S. 249 (1942), at 253:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this federal act; but employees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of surrounding circumstances as cases arise.' *Baizley Iron Works v. Span*, 281 U.S. 222, 230. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."

In that case the Court upheld an award of state compensation by the judicial expedient of recognizing a "twilight zone" in which the state law might permissively operate despite the fact that federal jurisdiction would also have been appropriate had it been administratively asserted.

It could serve no useful purpose to review what Judge Soper characterized as "the confusion that beclouds the

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[3] U.S. Const., art. III, §2.

welter of decisions on the subject,"[4] for in our opinion the decision of the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1961), is dispositive of the case at hand. There the Court upheld a federal award to an employee who at the time of his injury was engaged in the work of completing construction of a vessel on navigable waters. The Fifth Circuit had recognized what it assumed to be an accepted distinction between an employee engaged in repair work on a vessel which would fall within the federal statute and one engaged in construction of a vessel which would be covered by state compensation law. In reversing the Court of Appeals, the Court stated, at 116:

> "The Court of Appeals' interpretation of §3(a) would, if correct, have the effect of excepting from the Act's coverage not only the injuries suffered by employees while engaged in ship construction but also any other injuries—even though incurred on navigable waters and so within the reach of Congress—for which a state law could, constitutionally, provide compensation. But the Court of Appeals' interpretation is incorrect. The history of the Act, and of §3(a) in particular, contravenes it; and our decisions construing §3(a) have rejected it. Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."

At the Circuit level in *Calbeck* the Court observed: "We know by now that nothing written in this field is the last word. All it can be is 'the latest word.'"[5] In any event, since Harris received his injuries on navigable waters, we agree with the District Judge that *Calbeck* is controlling in this case.

Affirmed.

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[4] Travelers Ins. Co. v. McManigal, 139 F. 2d 949, 951 (4th Cir. 1944).

[5] Travelers Insurance Company v. Calbeck, 293 F. 2d 52, 60 (5th Cir. 1961).

APPENDIX B

Oral Opinion of the District Court

The facts in this case are stipulated and, as a consequence, there is no dispute as to the facts. Rather, the question presented is one solely of law.

As stipulated, the facts are that the decedent's death occurred as a result of an explosion and fire aboard the GUAM, a former war vessel of the United States, at a time when she was run aground in the Patapsco River for the purpose of being dismantled and the decedent and others were working on her in the dismantling process. It is stipulated that the Patapsco River is a navigable body of water.

Now the question then arises, since the decedent's widow applied for and obtained an award under the Longshoremen's and Harbor Worker's Act, as to whether that Act has application under the undisputed facts. I believe that it does.

As I read the Longshoremen's and Harbor Worker's Act and the cases construing it, particularly the most recent decision with which I am familiar, the Calbeck case, the Act has been construed to mean that the Longshoremen's and Harbor Worker's Act applies to all cases of disability or death resulting from an injury occurring upon the navigable waters of the United States.

More importantly, I think the Calbeck case equates. I think the legislative history supports, and I think the decisions in this Circuit also support the concept that navigable waters of the United States means the admiralty jurisdiction of the United States, wherever it may be from time to time.

I do not have any question in my mind but that this accident did occur upon navigable waters of the United States in the sense that the decedent was on the GUAM, which was, although run aground, in the Patapsco River and the Patapsco River is admittedly navigable.

The fact that the GUAM may have been a former warship, the fact that the GUAM was in the process of being dismantled, while I think may constitute colorable facts, do not constitute determinative facts, because the application of the Act — and this has been made clear by cases construing the Act — does not depend upon the decedent or the injured claimant being upon a vessel as such, or a vessel as such then engaged in commerce, either foreign or between the states.

Rather, as I see it, the test is one of whether the disability or death resulted from an injury upon navigable waters, and not only by analogy to the dry dock cases but also by analogy to the bridge cases, and particularly the Davis case. I think that where, as here, the decedent was on a vessel and the vessel was in a navigable stream, even though aground, that that sufficiently constitutes being upon the navigable waters to make the Longshoremen's and Harbor Worker's Act applicable.

I take some comfort also in the Admiralty Extension Act, Mr. Whiteford, because, true, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor Worker's Compensation Act was passed, but I think that the Calbeck case makes perfectly plain that the application of the Longshoremen's and Harbor Worker's Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Worker's Act a more flexible concept that under subsequent legislation or as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Worker's Act expands along with it.

Now, there is an additional reason which leads me to this same conclusion that I might mention that I take some comfort in. That is that by the terms of the Longshoremen's and Harbor Worker's Act, a claim is presumed to be within the coverage of the Act unless there is substantial evidence to the contrary.

We start out, therefore, with the presumption that this death occurred under circumstances which creates the situation of coverage of the Compensation Act.

I have no question, and I do not understand that anybody disputes, that the Maryland Workmen's Compensation Act would also apply. Hence, I have facing me a factual situation where presumptively, one Act applies, and not only presumptively but actually, the State Act also applies.

Thus, it seems to me that the case is clearly within the twilight zone doctrine as announced in Calbeck, and the Davis and the Parker cases which preceded it. Under such circumstances, I believe that the law as laid down by the Supreme Court is that the determination of the Deputy Commissioner that a case is within the twilight zone and that an award should be made under the fact situation as he finds it is entitled to great weight.

I do not suggest that if I thought clearly that the Compensation Act were inapplicable that I would be totally unjustified in setting aside the order of the Deputy Commissioner which says that the Act does apply, but I think that I can do so only on the clearest and most convincing facts or state of the law.

In this case, I think clearly the claimant is within the twilight zone. The Deputy Commissioner has undertaken to adjudicate that claim, and I, as a separate and independent reason for referring to the Deputy Commissioner, cannot find, certainly in the stipulated facts or in the undisputed facts, nor can I find in the law as decided by various Courts and as embodied in various statutes, any clear legal basis on which to say that the Deputy Commissioner might not properly have concluded, examining as he was this twilight zone, that the Longshoremen's and Harbor Worker's Compensation Act did have application so as to authorize him to make the award prescribed by statute in the case of death resulting from an injury occurring upon navigable waters.

For these reasons, gentlemen, I think that the order of the Deputy Commissioner must be affirmed, and the proceedings to set it aside will be dismissed.

APPENDIX C

Compensation Order

Award of Death Benefits and Reasonable Funeral and Burial Expense

Such investigation in respect to the above entitled claim having been made as is considered necessary, and formal hearing having been waived by the parties of interest, and a stipulation having been filed by the parties in lieu of such formal action, the Deputy Commissioner makes the following:

Findings of Fact

That on or about the 21st day of July 1961 the deceased above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co.; that on said day the deceased herein, while performing service as a welder for the employer, and engaged in dismantling a gun turret on board the U.S.S. "Guam", which had been run aground in the Patapsco River along side the employer's pier, sustained accidental injury when, while burning inside a gun turret of the vessel, a fire broke out, causing him to suffer extensive burns about the body, resulting in his death on 25 July 1961; that the U.S.S. "Guam" was a decommissioned battle cruiser of the United States Navy, which had been a part of the "mothball fleet" prior to its sale to the employer herein on 24 May 1961 for the purpose of dismantling the vessel for scrap; that the vessel was towed by tugs from Bayonne, New Jersey, on 14 July 1961, its engines and propellers inoperable; that on arrival in Baltimore 18 July 1961 the "Guam" was deliberately pushed with a running start by five (5) tugs into the mud along the north side of the employer's main pier; that the mean draft of the "Guam" was 26'9"; that the

average depth of the Patapsco River at this point (including 2′ of soft mud is 23′); that the "Guam" was thereafter secured to the pier with steel cables, where it was to remain for the entire scrapping operation.

That the primary job of the employer is dismantling of ships and reducing and non-ferrous metals to size and shape suitable for remelting that the employer has approximately fifty (50) per cent of its work force engaged in removing the steel, etc., and the remaining fifty (50) per cent are engaged in preparing the material to suitable size; that the employer herein does not unload ships, but does load vessels with scrap metal; that during the course of loading operations the employer utilizes approximately 15% of its work force, assisted by magnets and chutes; that the employer either charters its own vessels for a single voyage or loads vessels chartered by other firms and transports scrap metal to domestic and foreign ports as market conditions require; that the average weekly wage of the deceased at the time of his injuries was $87.20; that Minnie Naomi Harris, born on 8 June 1937, and married to the deceased on 25 April 1956, is the surviving wife of the deceased, and is entitled to death benefits at the rate of $30.52 per week beginning 25 July 1961 and continuing during her widowhood; that Kathy Mae Harris, born 5 December 1956, Richard Carlos Harris, born 3 December 1957, Janice Harris, born 4 May 1959, and Michael Harris, born 2 October 1960, are the surviving minor children of the deceased, and that Minnie Naomi Harris as mother and natural guardian of the dependent minor children is entitled to receive death benefits in their behalf for their maintenance and care at the rate of $27.61 per week; that compensation payments have accrued to the claimant in her own behalf and for the maintenance and care of the dependent minor children from 25 July 1961 to 30 July 1962, inclusive, 53 weeks, at $58.13 per week, in the amount of $3080.89; that Harvey's Funeral Home, Danville, Virginia, and Elroy Wilson, Brookland, Maryland, licensed undertakers, have rendered service incidental to the funeral and burial of the deceased in respective amounts of $130.00 and $706.00, none of which has been paid.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, The Boston Metals Co., and the insurance carrier, Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co., shall pay to the claimant death benefits from 25 July 1961 to 30 July 1962, inclusive, 53 weeks, $58.13 per week, in the amount of $3080.89, and continue payments thereafter in biweekly installments, at the rate of $58.13 per week, until further ORDERED.

That the employer and insurance carrier shall pay to Harvey's Funeral Home, 457 South Main Street, Danville, Virginia, the sum of $75.00, and to Elroy Wilson, Ritchie Highway and Ordnance Road, Brookland, Maryland, the sum of $325.00, as reasonable funeral and burial expense, each sum in partial reimbursement of the total allowable expense of $400.00.

A fee of $2,500.00 is approved in favor of Ruth L. Harvey and Tucker R. Dearing, Attorneys at Law, for services rendered on behalf of the claimant, which fee shall be a lien against the compensation payable to the claimant and shall be divided equally between the attorneys.

Given under my hand at Baltimore, Maryland this 15th day of August 1962.

STEPHEN O'HEARNE,
Deputy Commissioner,
Fourth Compensation District.